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PROPAGATING A *LEMON*: HOW THE SUPREME COURT ESTABLISHES RELIGION IN THE NAME OF NEUTRALITY

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*We must strive to do more than erect a constitutional 'signpost' to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be 'to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.'*¹

INTRODUCTION

Two displays of the Ten Commandments stand on government property.² The first is one among many historical documents on display inside a state courthouse.³ The second is a six foot high by three foot

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1. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (citations omitted) (citing Jesse Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332-33 (1963)). Ironically, the test established by Justice O'Connor—the reasonable observer test—does little more than provide an ambiguous standard. See generally Julie Van Groningen, Note, *Thou Shalt Reasonably Focus on its Context: Analyzing Public Displays of the Ten Commandments*, 39 VAL. U. L. REV. 219 (2004) (discussing the inconsistent applications of the reasonable observer test throughout the circuits). See *infra* Part I.C. for a brief explanation of the reasonable observer test.

2. The facts from this scenario are found in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary v. ACLU*, 545 U.S. 844 (2005).

3. *McCreary*, 545 U.S. at 844.

wide stone monument with the Decalogue inscribed on it, standing outside the state capitol building.⁴ According to the Supreme Court, the latter is constitutional,⁵ the former is not.⁶

On June 27, 2005, the Supreme Court, in two plurality decisions, found that the display inside the county courthouses violated the Establishment Clause,⁷ but held that the stone monument standing outside the capitol did not.⁸ In arriving at the former decision, the Court relied upon the alleged purposes behind erecting these displays⁹ and the neutrality of such displays¹⁰ to determine whether or not they violated the First Amendment. However, as this article will demonstrate, the purpose test and the neutrality test are not properly based upon the Establishment Clause or Establishment Clause jurisprudence.

Establishment Clause jurisprudence has fallen far from the proverbial tree in the last century as it has been molded and remolded to satisfy the whims of justices rendering result-oriented decisions. As Justice Thomas rightly pointed out in his concurring opinion in *Van Orden*, it is time for the Supreme Court to take a serious look at the quagmire it has created and to discard the various permutations it has created for a simpler, cleaner, and clearer approach to interpreting and applying the Establishment Clause.¹¹ To that end, this article reviews current Establishment Clause jurisprudence and offers an appropriate standard for the Court to adopt. Specifically, Part I reviews the history of the Establishment Clause, looking at how it was understood at its ratification,¹² as well as its modern interpretation and current

4. *Van Orden*, 545 U.S. at 677.

5. *Id.* at 692.

6. *McCreary*, 545 U.S. at 881.

7. *Id.*

8. *Van Orden*, 545 U.S. at 692.

9. *McCreary*, 545 U.S. at 859-74.

10. *Id.* at 874-79.

11. *Van Orden*, 545 U.S. at 692-94 (Thomas, J., concurring).

12. See *infra* text accompanying notes 25-47. Reviewing the ratification process of the First Amendment is critical in understanding what the First Amendment was, and was not, designed to protect or prevent. Relying upon how the framers acted subsequent to the Bill of Rights passage is not wholly adequate because those whose views were not supported or not considered at the passage of the Bill of Rights may still assert their minority or novel perspective in applying it. For example, Thomas Jefferson, who was not part of the committee or house debates

applications.¹³ Part II analyzes the Court's recent decisions of *McCreary* and *Van Orden*,¹⁴ critiquing the current tests employed for Establishment Clause analysis.¹⁵ Finally, Part III advocates narrowing Establishment Clause analysis to its original parameters and reviewing those issues inappropriately subjected to Establishment Clause scrutiny under their proper constitutional provision: free speech.¹⁶

I. THE LEGAL STATE OF THE ESTABLISHMENT CLAUSE

*Our Religion Clause jurisprudence has become bedeviled by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions.*¹⁷

The First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹⁸ The first of these religion

but was instead in France, did not pray Christological prayers as President. See Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 9 THE WRITINGS OF THOMAS JEFFERSON 174, 174-76 (Paul Leicester Ford ed., 1898). While this is his perspective of what he should or should not do as President, perhaps because of Constitutional restraints, perhaps because of his own personal reservations, it should have no bearing upon whether the Establishment Clause reaches prayers offered by the President. Likewise, the fact that George Washington was asked by Congress to offer a Thanksgiving Day Proclamation as President, 1 ANNALS OF CONGRESS 923 (Joseph Gales ed., 1834) [Hereinafter ANNALS], should have little bearing upon Establishment Clause jurisprudence because he was President at the time of the Bill of Rights passage and, as such, did not participate except, perhaps, at arms length in the Congressional process of ratifying the Bill of Rights.

13. See *infra* text accompanying notes 48-129.

14. See sources cited *supra* note 2.

15. See *infra* notes 134-231 and accompanying text.

16. See *infra* notes 233-45 and accompanying text.

17. *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting).

18. U.S. CONST. amend. I. Significantly, "the First Amendment does not ask [Congress] to refrain from intervening in religious matters"—it commands it unflinchingly. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 60 (Craig Joyce ed., 2003). The First Amendment is part of a greater document—the Bill of Rights—that the framers drafted to "buil[d] a wall around certain fundamental individual freedoms, forever limiting the majority's ability to intrude upon them." *Id.* at 59. At its ratification, the government had little "involvement in education,

clauses is referred to as the Establishment Clause, the latter as the Free Exercise Clause.¹⁹ Both clauses are designed to guarantee religious freedom in two different manners.²⁰ The Establishment Clause was designed to separate the government from religion, while the Free Exercise Clause preserves freedom from coercion in choosing a religion.²¹

Focusing on the first of these two clauses, this part traces the history and development of the Establishment Clause. First, Section A discusses the original intent of the Establishment Clause at its ratification.²² Section B explains the modern interpretation of the Establishment Clause under *Lemon v. Kurtzman*.²³ Last, Sections C and D address further interpretations of the Establishment Clause and the current use of the *Lemon* test.²⁴

A. *The Framing and Ratification of the Establishment Clause*

James Madison first proposed amending the Constitution as a House Representative on June 8, 1789.²⁵ Among the first amendments

social welfare, or the formation and transmission of culture.” Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 5, 21 (Michael W. McConnell et al. eds., 2001).

19. See, e.g., *Locke v. Davey*, 540 U.S. 712, 712 (2004); *Walz v. Tax Comm’n*, 397 U.S. 664, 667-68 (1970).

20. See 2 DAVID M. O’BRIEN, CONSTITUTIONAL LAW AND POLITICS 631 (3d ed. 1997).

21. *Id.* While the purposes of the Establishment Clause are significant, they should not be given too much credence. But see *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring). The purpose of the Establishment Clause is relevant in as much as the purposes viewed by the framers are considered. Since its passage, scholars may view the purpose of the Establishment Clause to be substantially different—perspectives that may yield significantly disparate results. The *McCreary* and *Van Orden* decisions are recent proof of this problem. See *infra* text accompanying notes 100-129. Consequently, it would behoove the Court to weigh only those purposes and concerns articulated by those who had the ultimate authority to craft the provision rather than those purposes that they, or other academicians, advance.

22. See *infra* notes 25-47 and accompanying text.

23. 403 U.S. 602 (1971). See *infra* notes 48-77 and accompanying text.

24. See *infra* notes 81-132 and accompanying text.

25. ANNALS, *supra* note 12 at 440-41 (Joseph Gales ed., 1834). Madison did not view the passage of a bill of rights to be terribly important. In a letter to Thomas

was the first draft of the religion clauses, which stated: “the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”²⁶ Initially, the House was opposed to the amendments, wishing to focus instead on other issues at hand.²⁷ However, by the end of the day in which he raised the issue, Madison convinced the House to take up the issue of amending the Constitution.²⁸

Jefferson regarding proposing a bill of rights, Madison stated that he did not believe the bill to be significant for several reasons, the foremost of which was that “the rights in question are reserved by the manner in which the federal powers are granted.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *id.* at 477. Further, he did not view the government as a real threat of oppression in violation of such a bill of rights, but rather, “[w]herever the real power in a [g]overnment lies, there is the danger of oppression.” *Id.* He believed the real power was in the majority of the people, and that the majority of people might use the government as a tool in the hands of such a majority. *Id.* Because of this, when George Mason and Elbridge Gerry on September 12, 1787, during the Constitutional Convention in Philadelphia, moved for a committee to be created to draft a bill of rights, the motion was unanimously rejected by all, including Madison and Washington. R. Carter Pittman, *Our Bill of Rights: How It Came to Be*, http://rcarterpittman.org/essays/Bill_of_Rights/Our_Bill_of_Rights.html (last visited Mar. 25, 2009). However, Madison ultimately became an advocate for a bill of rights, “provided it be so framed as not to imply powers not meant to be included in the enumeration.” Letter from James Madison to Thomas Jefferson, *supra*. He conceded that “there may be occasions on which . . . evil may spring from the [usurped acts of the Government].” *Id.*

26. ANNALS, *supra* note 12, at 434. The bill of rights Madison proposed is almost verbatim a copy of the bill of rights proposed by Virginia. Pittman, *supra* note 25. The Virginia bill of rights was copied almost verbatim from a draft by George Mason, *id.*, who is considered the “Father of the Bill of Rights.” DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION 23 (2d. ed., 1997). The language proposed by Mason stated that “all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience; and that no particular sect or society of Christians ought to be favored or established by law in preference to others.” KATE MASON ROWLAND, THE LIFE OF GEORGE MASON 244 (1892). Likewise, the preamble of the Declaration of Independence, which contains similar concepts as those proposed by Madison and which was drafted by Thomas Jefferson, originated from the writings of George Mason’s original draft, published in newspapers on June 1, 1776. Pittman, *supra* note 25.

27. ANNALS, *supra* note 12, at 441-44, 462, 685-91.

28. *Id.* at 450.

His proposals were referred to a select committee, of which he was a member.²⁹ On July 28, 1789, the committee reported back to the House, amending the provision to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."³⁰ During debate in the House, it was further amended to read: "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed."³¹ Although the language was proposed in this form, some representatives worried that the amended language might be thought to abolish religion altogether;³² others thought that a better version would read "no religious doctrine shall be established by law."³³

After the passage of the House's proposed language, the Senate began debating its proposal in secret.³⁴ On September 9, 1789,³⁵ the Senate successfully amended the proposed language to read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion," intending to narrow the amendment to prohibiting Congress only from supporting or endorsing a single denomination or national religion.³⁶

29. O'BRIEN, *supra* note 20, at 635.

30. *Amendments Reported by the Select Committee, July 28, 1789*, http://www.constitution.org/bor/amd_scom.htm (last visited Mar. 25, 2009).

31. *Amendments Passed by the House of Representatives, August 24, 1789*, http://www.constitution.org/bor/amd_hr.htm (last visited Mar. 25, 2009).

32. ANNALS, *supra* note 12, at 729. Specifically, "[Mr. Sylvester] feared it might be thought to have a tendency to abolish religion altogether." Likewise, "Mr. Huntington said that . . . the words might be taken in such latitude as to be extremely hurtful to the cause of religion" and that "others might find it convenient to put another construction upon it." *Id.* at 730.

33. *Id.* at 730. Similarly, Madison thought that including the word "national" before religion would "point the amendment directly to the object it was intended to prevent." *Id.* at 24.

34. O'BRIEN, *supra* note 20, at 635.

35. *Amendments Passed by the Senate, September 9, 1789*, http://www.constitution.org/bor/amd_sen.txt (last visited Mar. 22, 2009).

36. O'BRIEN, *supra* note 20, at 635. Three motions to amend the proposed language failed; the suggested changes included narrowing the amendment to ban preference of "one religious sect or society," or "any particular denomination of religion in preference to another." *Id.* The final, successfully amended language permitted Congress to provide governmental aid to all religions, provided it was done in a nondiscriminatory fashion. *Id.*

The Senate's changes were met with opposition in the House.³⁷ However, on September 24, 1789, the House decided to accept the Senate's proposed amendment, provided that it was modified to read as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."³⁸ The Senate agreed to these changes.³⁹ They were adopted on September 25, 1789.⁴⁰

Those supporting the amendment of the Constitution had several reasons for preventing the establishment of a religion.⁴¹ The framers were concerned with the power of the religious establishment they observed in England, which served as a religious "endowment, at the public expense, in exclusion of or in preference to any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship or religious observances."⁴² The framers did not want to duplicate this scenario by

37. ANNALS, *supra* note 12, at 948.

38. *Id.* at 913.

39. *Id.* at 88.

40. *Id.* Madison's efforts to prevent states from establishing and restricting religion and religious practices failed. O'BRIEN, *supra* note 20, at 635. Thus, for example, Massachusetts continued to deny Jews the right to hold public office until 1828. *Id.* The Religion Clauses were not applied to the states until after the passage of the Fourteenth Amendment and the Supreme Court's ruling in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), finding that the free exercise clause was applicable to the states, and *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947), incorporating the Establishment Clause to the states. O'BRIEN, *supra* note 20, at 635-36. See *infra* note 48 for a discussion of the *Everson* case. Such incorporation violates the framers' intent because it was specifically amended to be directed at Congress. See Letter from James Madison to Thomas Jefferson, *supra* note 25. But see generally Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551 (1998) (arguing that the incorporation of the First Amendment to the states was a natural byproduct of the Fourteenth Amendment).

41. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 90 (2002). Establishment concerns were often voiced in more generic terms as "freedom of religion" and "freedom of conscience." *Id.* at 95.

42. BARTON, *supra* note 26, at 30-31. (quoting The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress, 1852-53 1, 6, 8-9 (Washington: A.O.P. Nicholson, 1854)). The distinction between the church and state was also important to the framers because of the religious "two-kingdoms" notion that the kingdom of God is not subject to earthly, political kingdoms. McConnell, *supra* note 18, at 10. This notion is

restraining public religious expression and saw preventing governmentally-established national denominations as a means of ensuring that the federal government never imposed such restraints.⁴³

Additionally, while the framers sought to protect religion,⁴⁴ they also wanted to ensure that no establishment privileges existed, such as

ultimately derived from the writings of Saint Augustine. See SAINT AUGUSTINE, *THE CITY OF GOD* 477 (Marcus Dods trans., The Modern Library 2000) (1950).

43. BARTON, *supra* note 26, at 21, 24. Additionally, the framers never intended the First Amendment to apply to the states as “it was well established that the States were free to do as they pleased” where the establishment of religion was concerned. *Id.* at 24-25. In fact, “virtually all of the Bill of Rights provisions represent[ed] restraints upon Congress . . . most of them had been originally intended to be placed in Article I of the Constitution, with the others intended to be placed in Article III and VI.” GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION* 49 (1995). Thus, Congress could neither create its own national religious establishments nor interfere with any state’s religious establishments. *Id.* at 56. Interestingly, most states’ constitutions did not use this reserved power to establish a state religion. See, e.g., 1818 CONST. OF THE STATE OF CONN. art. 7, § 1 (1818) (“And each and every society or denomination of Christians in this state shall have and enjoy the same and equal powers, rights, and privileges[.]”); N.C. CONST. art. I, § 13 (2007) (“All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.”); N.H. CONST. art. 6 (2008) (“And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established[.]”); N.J. CONST. art. I para. 4 (“There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.”). However, several of the states that ratified the Bill of Rights had established churches within their borders. RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 163 (2003). The First Amendment was incorporated to the states via the Fourteenth Amendment, which mandates that states afford its citizens due process and equal protection of the laws. O’CONNOR, *supra* note 18, at 59.

44. See, e.g., TEXT OF THE NORTHWEST ORDINANCE OF 1787, art. III, <http://www.earlyamerica.com/earlyamerica/milestones/ordinance/text.html> (last visited Mar. 22, 2009) (“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”) (*cited by* BARTON, *supra* note 26, at 41)). In order to gain admittance to the union, each state was required to adopt the tenets of the Northwest Ordinance. BARTON, *supra* note 26, at 41. As such, Congress not only expected but mandated “religion, morality, and knowledge” in the schools. *Id.* Further,

clergy being paid out of state coffers or clergy holding exclusive power to perform marriages.⁴⁵ The ultimate concern was that of religious liberty; an established national religion would infringe upon the people's natural right of religious liberty and create inequality of such liberty.⁴⁶ The form of the First Amendment ultimately addressed the privileges concern by denying Congress the power to establish a religion while also preserving religious equality by protecting "the free exercise thereof."⁴⁷

B. *The Lemon Test*

While the Supreme Court has heard various Establishment Clause cases since the passage of the religion clauses,⁴⁸ no detailed test

"[e]xtensive, almost natural, collaboration between Church and State may be seen again and again in eighteenth-century America." ANASTAPLO, *supra* note 43, at 56.

45. HAMBURGER, *supra* note 41, at 90. Granting such privileges was also viewed as a penalty of free exercise of religion, as dissenters who did not wish their tax money to pay clergy had little choice in the matter. *Id.*

46. *Id.* at 96-98. Natural rights describe rights one would enjoy in the hypothetical state of nature, posited most notably by Thomas Hobbes, Jean-Jacques Rousseau, and John Locke. *Id.* at 98. In contrast, James Madison wanted to limit the legislative power of civil government so that it had no jurisdiction over religion. *Id.* at 100. For further reading on Madison's perspective, see generally James Madison, *Memorial and Remonstrance against Religious Assessments*, in 8 PAPERS OF JAMES MADISON 295 (ca. June 20, 1785). Such desires stemmed from the founders' fear of the Roman Catholic Church's doctrine that vests "total, absolute, and irrevocable power in a single body," leaving no recourse to the people. BARTON, *supra* note 26, at 26. Consequently, some states excluded from office those who claimed allegiance to a "foreign power." *Id.* at 27.

47. See HAMBURGER, *supra* note 41, at 101.

48. See, e.g., *Waltz v. Tax Comm'n*, 397 U.S. 664, 675 (1970) (holding that granting of tax exemption to church did not violate Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that Board of Regent's prayer in New York schools violated Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (deciding that program allowing for school absence for religious observance did not violate First Amendment); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948) (maintaining that First Amendment precluded religious classes in public schools). While many more archaic cases exist, these cases are the most relevant to the focus of this article. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Board of Education authorized funding by resolution for the transportation of students to both public and parochial schools. *Everson*, 330 U.S. at 3. The Supreme Court held this resolution was not a violation of the Establishment Clause. *Id.* at 2. Specifically, the Court reasoned that while a strict wall of

was officially established until *Lemon v. Kurtzman*.⁴⁹ In *Lemon*, the plaintiffs questioned the constitutionality of Rhode Island's 1969 Salary Supplement Act and Pennsylvania's 1968 Nonpublic Elementary and Secondary Education Act.⁵⁰ The acts provided financial supplement and authorization to contract with nonpublic school teachers who taught secular subjects, respectively.⁵¹ The objective of these statutes was to offset the rising salaries in public schools, which in turn threatened the quality of education in nonpublic elementary schools.⁵²

The United States District Court for the District of Rhode Island found its statute to be in violation of the Establishment Clause, stating that it fostered excessive entanglement between the government and religion.⁵³ In contrast, the United States District Court for the Eastern District of Pennsylvania dismissed plaintiffs' complaints for failure to

separation between religion and state and federal governments was intended by the framers, New Jersey did not breach that wall, as the busing was provided indiscriminately to all students. *See id.* at 17-18. It was because of this decision that the Court began a new, divergent path, determining what the Court's new "religion in general" meant and opening the door to evaluation of everything from government tax policies to nativity scenes in public places. HITTINGER, *supra* note 43, at 164.

49. 403 U.S. 602 (1971).

50. The plaintiffs were composed of citizens and taxpayers, as well as organizations promoting the belief in separation of church and state. *Id.* at 608, 610-11. The organizations were denied standing. *Id.* at 611. The plaintiffs asserted that the statutes were unconstitutional under the Establishment Clause, the Free Exercise Clause, the Due Process Clause, as well as the Equal Protection Clause. *Id.* at 606. For a discussion on notions of separation of church and state, *see infra* note 62.

51. *Lemon*, 403 U.S. at 606-607. Pursuant to the Rhode Island statute, a teacher could be supplemented not more than fifteen percent of his or her current annual salary, if he or she taught at a nonpublic school at which the average per-pupil expenditure for secular education was less than that of State's public schools. *Id.* at 607-608. The statute limits secular education to those subjects taught at the State's public schools, using the same teaching materials. *Id.* at 608. Under the Pennsylvania statute, the state Superintendent of Public Instruction could purchase secular educational services from nonpublic schools by forming contracts as authorized by the statute. *Id.* at 609. The State would then directly reimburse the nonpublic school for actual expenditures on secular education. *Id.* Five million dollars were spent annually under the statute. *Id.* at 610. The statute was initially funded by a tax on horse and harness racing, then by tax revenue from the sale of cigarettes. *Id.* at 610-11.

52. *Id.* at 607-13.

53. *Id.* at 609.

state a claim.⁵⁴ Both Appellate Courts affirmed the lower courts' decisions.⁵⁵

The United States Supreme Court found that both statutes violated the Establishment Clause.⁵⁶ In analyzing the cases, the Court created a three-prong test, each prong derived from previous case precedent.⁵⁷ First, the Court stated that the statute at bar must serve a secular legislative purpose.⁵⁸ Second, the primary effect of the statute must be one that neither advances nor inhibits religion.⁵⁹ Finally, the statute must not foster excessive entanglement with religion.⁶⁰ Under the first two prongs, the Court reasoned that nothing in either statute's legislative history evidenced a legislative intent to advance religion, as the statutes themselves clearly stated that they were intended to enhance the quality of secular education in all schools.⁶¹ However, the Court found that the statutes involved excessive entanglement between the government and religion.⁶²

54. *Id.* at 611.

55. *Id.* at 609, 611.

56. *Id.* at 625.

57. *Id.* at 612-13. The Court claimed that its test used "cumulative criteria developed by the Court over many years." *Id.* at 612. However, the Court relied almost exclusively upon two cases from 1968 and 1970, respectively. *See infra* notes 58 and 60 for a discussion of each of these cases.

58. *Lemon*, 403 U.S. at 612. The Court derived this prong from *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). In *Allen*, the Court found that a New York statute requiring the school districts to purchase and loan textbooks to parochial, as well as public and private schools, was constitutional because the statute had the secular legislative purpose of providing educational opportunities to children. *Id.* at 243.

59. *Lemon*, 403 U.S. at 612. This prong was derived from *Allen*, 392 U.S. at 243. For a discussion of this case, *see supra* note 58.

60. *Lemon*, 403 U.S. at 613. The Court gleaned this prong from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). In *Walz*, the Court held that a New York City ordinance giving tax exemptions to religious organizations using property for religious worship was constitutional because it did not require continuing surveillance by or more than a minimal nexus with the government to ensure the tax exemption was properly granted. *Id.* at 675-76.

61. *Lemon*, 403 U.S. at 613. The Court addresses each of these two prongs jointly and convolutedly in one paragraph. *See id.*

62. *Id.* at 614. The Court was quick to point out that total separation between church and state was not necessary, as it is not possible in the absolute sense. *Id.* However, the goal is "to prevent, as far as possible, the intrusion of either [religion

In determining excessive entanglement, the Court looked at the character and purpose of the institutions that benefited from the statutes, the nature of the aid provided, and the resulting relationship between the religious institution and the government.⁶³ For the Rhode Island statute, the Court found that the benefiting schools were near churches and were supervised by the Bishop of Providence, Rhode Island.⁶⁴ The schools contained religious symbols such as crosses and crucifixes, and were governed by an employee's handbook that had the force of synodal law.⁶⁵ Further, two-thirds of the teachers were nuns, who the Court believed could not maintain religious neutrality effectively while administering secular duties.⁶⁶ As such, the state was required under the

or state] into the precincts of the other." *Id.* The wall of separation doctrine to which the Court referred is a byproduct of concern in the nineteenth and twentieth centuries of the power of the church, particularly the Catholic Church, with its ecclesiastical power. HAMBURGER, *supra* note 41, at 480-81. This notion of separation of church and state is derived from a letter from President Thomas Jefferson to the Danbury Baptist Association, penned in 1802, which states "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." BARTON, *supra* note 26, at 45-46. Jefferson borrowed this notion from Roger Williams, who used the metaphor to defend the integrity of religion in 1644, arguing that:

when [the faithful labors of many witnesses of Jesus Christ]
have opened a gap in the hedge or *wall of separation* between
the garden of the church and the wilderness of the world, God
hath ever broke down the wall itself, removed the candlestick,
and made His garden a wilderness, as at this day.

LEONARD LEVY, *THE ESTABLISHMENT CLAUSE* 184 (1986) (emphasis added) (citing *Roger Williams, A Letter of Mr. John Cottons* (1643), in *THE COMPLETE WRITINGS OF ROGER WILLIAMS* (1963)). Thus, thirteen years after the adoption of the religion clauses, President Jefferson redefined the term to mean something different than was intended, changing an opening of the wall between church and state to maintaining of a wall. As such, "the constitutional authority for separation is without historical foundation" and undermines religious freedom. HAMBURGER, *supra* note 41, at 481, 483.

63. *Lemon*, 403 U.S. at 615.

64. *Id.* at 615, 617.

65. *Id.* at 615, 618.

66. *See id.* at 615. Several teachers testified that they "did not inject religion into their secular classes." *Id.* at 618. However, the Court reasoned that because "[t]he teacher is employed by a religious organization, subject to the direction and discipline of religious authorities," such teachers "would find it hard to make a total separation between secular teaching and religious doctrine." *Id.* at 618-19.

statute to provide continuous surveillance of the schools in order to ensure that the money provided was going to secular education.⁶⁷ Additionally, the statute required that in nonpublic schools where average per-pupil expenditures equaled or exceeded that of public schools, the state would evaluate the percentage of total expenditures that covered secular education compared to the percentage that covered religious teaching.⁶⁸ Because of this degree of mandated state oversight, the Court found that the statute required excessive entanglement.⁶⁹ As such, the Court held the statute unconstitutional.⁷⁰

Similarly, the Court found that the Pennsylvania statute required excessive entanglement, because the benefiting schools were controlled by religious organizations, had the purpose of propagating and promoting a particular religious faith, and conducted their operations to fulfill that purpose.⁷¹ Further, the statute provided money directly to the schools, rather than to the students or their parents.⁷² This direct interaction between the government and religious schools mandated too much interaction and involvement.⁷³ Therefore, the Court held that plaintiffs

Ultimately, the Court was worried that “the potential for impermissible fostering of religion [was] present.” *Id.* at 619.

67. *Id.* at 619. The Court reasoned that a teacher would need constant supervision to ensure that the teacher is honoring the secular purpose requirement of the statute.

68. *Id.* at 620.

69. *Id.* Specifically, the Court stated that “[t]his kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.” *Id.*

70. *Id.*

71. *Id.* Because the Pennsylvania case had been dismissed for failure to state a claim, the Court asserted that the complaint’s allegations must be accepted as true for purposes of the Court’s review. *Id.*

72. *Id.* at 621. If the money had gone to the student or his or her parents, the entanglement between government and religion would be less substantial. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (giving significance to the fact that the vouchers were given to parents, who in turn selected a school for their children); *Bd. of Educ. v. Allen*, 392 U.S. 236, 243–44 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

73. *Lemon*, 403 U.S. at 621–22.

had a cause of action, as the evidence could demonstrate that the statute created excessive entanglement.⁷⁴

The concurrence, penned by Justice Douglas, sought to bolster the majority's holding by citing Madison's Third Remonstrance,⁷⁵ which states that tax measures supporting religious activities "will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects."⁷⁶ Such "intermeddling," or "entanglement," the concurring justices opined, violated the Establishment Clause.⁷⁷

C. *Judicial Use of the Lemon Test*

Since *Lemon*, the Supreme Court has handed down many Establishment Clause decisions,⁷⁸ and the results have been arbitrary and

74. *Id.* at 625. The Court went on, emphasizing that while parochial schools' financial needs may become a political issue that states might be interested in funding, it is precisely the political division along religious lines that the Religion Clauses were trying to avoid. *Id.* at 622.

75. *Id.* at 633-34 (Douglas, J., concurring).

76. *Id.* at 634. Madison's Third Remonstrance was penned in 1785, well after the passage of the Bill of Rights. See *supra* note 46.

77. *Lemon*, 403 U.S. at 634 (Douglas, J., concurring).

78. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002) (holding that scholarship program offering funding for a choice of private or public school education did not violate the Establishment Clause); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1251 (2000) (denying certiorari to appeal from order enjoining school from reading a disclaimer before teaching evolution); *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997) (overruling prior decision that using federally funded teachers in religious schools to educate the disadvantaged violated the Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-96 (1993) (deciding that a group should not be denied access to show a film on unoccupied school property because of its religious viewpoint); *Bowen v. Kendrick*, 487 U.S. 589, 620-21 (1988) (holding that federal grants did not have to be withheld from an adolescent sexuality and pregnancy services program because of a religious connection); *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987) (affirming lower court holding that the Louisiana Creationism Act violated the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (holding that Alabama statutes allowing prayer in schools violated the Establishment Clause by suggesting state approval of such); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (holding that city's display of a crèche did not violate the Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783, 793-94 (1983) (deciding that the employment of a chaplain to open state legislature sessions did not violate

inconsistent. For example, the following two fact scenarios came before the Court on two separate occasions.⁷⁹ In the first instance, a city displayed a crèche, or nativity scene, in a city park in the city's shopping district.⁸⁰ This scene was part of the city's annual Christmas display to celebrate the Christmas season, which includes Santa Claus, a Christmas

the Establishment Clause); *Mueller v. Allen*, 463 U.S. 388, 401-402 (1983) (holding that a tax deduction offered on elementary and secondary school expenses that was also available to parents of parochial school students was not a violation of the Establishment Clause); *Larkin v. Grendel's Den*, 454 U.S. 1140, 1140 (1982) (noting probable jurisdiction for Court of Appeals decision that a statute allowing a church to prevent the granting of nearby alcoholic beverage license was unconstitutional); *Widmar v. Vincent*, 454 U.S. 263, 273 (1981) (holding that Establishment Clause did not require prohibiting a student religious group from meeting in university buildings); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (holding that a statute which required the posting of the Ten Commandments in public classrooms was unconstitutional); *Comm. for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 660-61 (1980) (affirming lower court decision that statutory reimbursement for private schools' performance of state-mandated testing was constitutional); *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) (holding a statute that allowed for fixed payments to private schools to pay for required services violated the First and Fourteenth Amendments); *Wolman v. Walter*, 433 U.S. 229, 255 (1977) (deciding that a state's provision of books and supplies to private schools was constitutional, while field trip services were not); *Roemer v. Md. Bd. of Pub. Works*, 426 U.S. 736, 760-61 (1976) (affirming lower court decision that state grants to private colleges with screening processes did not violate Establishment Clause); *Meek v. Pittenger*, 421 U.S. 349, 362-63 (1975) (holding that loaning of textbooks to private schools was constitutional, but providing auxiliary services violated the Establishment Clause); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (holding that Pennsylvania act which provided reimbursement to parents whose children attended nonpublic schools violated the Establishment Clause); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973) (holding that New York's establishment of financial aid grants and reimbursements for nonpublic schools was unconstitutional); *Levitt v. Comm'n for Pub. Educ. and Religious Liberty*, 413 U.S. 472, 482 (1973) (deciding that lump sum reimbursement to private schools for required services violated the Establishment Clause); *Essex v. Wolman*, 409 U.S. 808, 808 (1972) (noting probable jurisdiction for decision that the reimbursement of partial tuitions for private schools violated the Establishment Clause); *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (holding that grants given to public and private schools under the Higher Education Facilities Act did not violate the Establishment Clause).

79. See sources cited *infra* notes 85 and 88.

80. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

tree, and a banner saying "Season's Greetings."⁸¹ While the lower courts found that the crèche violated the Establishment Clause, the Supreme Court found that it did not violate that clause.⁸² Specifically, the Court stated that the scene satisfied the *Lemon* test in that it served a secular purpose, was sufficiently neutral, and did not result in excessive government entanglement.⁸³ As such, the display was constitutional.⁸⁴

In the second instance, a city displayed a crèche on the staircase of the county courthouse as part of the county's annual Christmas carol program with an angel and a banner stating "Gloria in Excelsis Deo."⁸⁵ The lower court found the scene to be constitutional, but both the appellate court and the Supreme Court found that it impermissibly violated the Establishment Clause by endorsing Christianity with the angel's religious statement because it did not have anything else to detract from that message.⁸⁶ As such, the crèche was not sufficiently neutral to satisfy the *Lemon* test.⁸⁷ These two decisions establish the arbitrary and counterintuitive standard that religious displays are constitutionally permissible only if they are accompanied by other displays to detract from the religious display's message, a standard which was short-lived.⁸⁸

The Court further confounded Establishment Clause jurisprudence by determining that the *Lemon* test did not apply to all Establishment Clause challenges and by applying new, alternative standards to such challenges.⁸⁹ In 1989, the Supreme Court decided

81. *Id.*

82. *Id.* at 671-72.

83. *Id.* at 685.

84. *Id.* at 687.

85. *County of Allegheny v. ACLU*, 492 U.S. 573, 580-81 (1989). Also challenged was a menorah placed outside a government building alongside a Christmas tree and a "sign saluting liberty." *Id.* at 578. The Court found that challenge constitutional under *Lynch*. *Id.* at 621.

86. *Id.* at 578-79, 588-89.

87. *Id.* at 599-600.

88. *See McCreary v. ACLU*, 545 U.S. 844, 866 (2005) (holding that despite the Ten Commandments being part of a larger display of historical documents, it was unconstitutional under the Establishment Clause); *see also Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005) (holding that a six by three foot monument, one of seventeen on a twenty-one acre property, did not violate the Establishment Clause).

89. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) (declining to apply *Lemon* because of the pervasive government involvement with religion); *Allegheny*,

County of Allegheny v. American Civil Liberties Union.⁹⁰ In *Allegheny*,⁹¹ Justice O'Connor, casting the deciding vote, articulated a new test to clarify the *Lemon* test—the “reasonable observer” test.⁹² This new test states that if a reasonable observer would believe that the government’s actions are endorsing or disapproving of religion, such an act is unconstitutional.⁹³ Because it was a plurality decision, it did not overturn *Lemon*.⁹⁴ Since that decision, only Justice O'Connor has consistently adhered to the reasonable observer test.⁹⁵

In similar fashion in 1992, Justice Kennedy laid out a third test to function as the threshold analysis for the *Lemon* test—the “coercion test.”⁹⁶ This test focuses on the preliminary matter of whether the government coerces a citizen to support or participate in religion or its

492 U.S. at 628-29 (O'Connor, J., concurring) (promoting the employment of a modified *Lemon* test).

90. 492 U.S. 573 (1989).

91. In *Allegheny*, a crèche placed in the county courthouse was challenged as an unconstitutional violation of the Establishment Clause. *Id.* at 579-80. A divided plurality agreed. *Id.* at 577-78.

92. *Id.* at 630-31 (O'Connor, J., concurring).

93. *Id.* at 631.

94. *Id.* at 621 (stating that the lower court could consider, on remand, whether the display of the menorah violated the “purpose” or “entanglement” prongs of the *Lemon* test).

95. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 141 (2001) (Souter, J., dissenting) (noting Justice O'Connor's support of the reasonable observer test); *Mitchell v. Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring) (applying the reasonable observer analysis); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 848 (1995) (O'Connor, J., concurring) (using the reasonable observer test in the context of the neutrality principle); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) (using the reasonable observer analysis to argue that the government should avoid appearing to endorse religion). No direct mention of this standard is mentioned in her concurrence in *McCreary* or in her dissent in *Van Orden*.

96. See *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, a middle school in Rhode Island invited a rabbi to offer prayers at the 1989 graduation exercises. *Id.* at 581. The father of a student, Daniel Weisman, brought a claim against the school, claiming an Establishment Clause violation. *Id.* at 584. The Supreme Court affirmed the Court of Appeals, holding that the school should be enjoined from prayers at future high school graduations because the government involvement in the situation was both pervasive and divisive, and the students had no choice but to be pressured into respectful silence for the prayer. *Id.* at 587-88, 593.

exercise.⁹⁷ Again, this new test did not reexamine or overrule *Lemon*; consequently, *Lemon* continued to be good law.⁹⁸ Thus, the Supreme Court now employs three tests: two derived from *Lemon*, and each employed arbitrarily.⁹⁹

D. *The McCreary Plurality and the Van Orden Dissent: the Court's Nod To Lemon*

In 2005, the Court decided *Van Orden v. Perry*¹⁰⁰ and *McCreary v. ACLU*.¹⁰¹ The *Van Orden* case involved a six foot by three foot monolith donated by the Fraternal Order of Eagles¹⁰² to be placed outside

97. *Id.* at 587, 592. Such a test has the effect of reorienting the analysis to individuals, thereby privatizing religion and making the test more relevant to free exercise analysis. See *supra* text accompanying note 21.

98. Justice Kennedy stated in *Lee* that, because the initial threshold issue of coercion would suffice to address the constitutionality of the issue at bar, reevaluation of *Lemon* was not necessary. *Lee*, 505 U.S. at 587.

99. Carole K. Kagan, *Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 634 (1995) ("The Court has been unable to apply the test in a consistent fashion") (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 21-22 (Blackmun, J., dissenting)). Some have argued that this inconsistency, rather than any inherent problems within the test itself, is the source of the problem. See *id.* Others have argued that regardless of which of the three tests are used, the reasoning found in them is "almost entirely extralegal," having "little to do with the technical apparatus of law and legal interpretation." HITTINGER, *supra* note 43, at 166. All of these tests, it is alleged, are extremely skeptical, if not outright hostile, to religion, declaring it to be divisive, coercive, and irrational, and redefines religion as whatever an individual wants it to mean. *Id.* at 164-68. Such an approach to the law is merely a byproduct of postmodernism, which advocates social constructivism and rejects or undermines the value of reason. GENE EDWARD VEITH, JR., *POSTMODERN TIMES: A CHRISTIAN GUIDE TO CONTEMPORARY THOUGHT AND CULTURE* 158 (1994). For a discussion of the tenets of postmodernism, see *id.* at 158-59.

100. 545 U.S. 677 (2005).

101. 545 U.S. 844 (2005).

102. At the bottom of the monolith was the following inscription: "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961." *Van Orden*, 545 U.S. at 681-82. How a gift from a private organization to the state government constitutes "a law" under the First Amendment so as to trigger the application of the Establishment Clause is not explained in the decision and is troubling.

the Texas State Capitol.¹⁰³ Inscribed on the monument was the text of the Ten Commandments.¹⁰⁴ The monument was one of seventeen such monuments placed in the twenty-two acres surrounding the Texas State Capitol.¹⁰⁵

Forty years after the monument was erected, Thomas Van Orden challenged its existence as a violation of the First Amendment's Establishment Clause. In particular, Mr. Van Orden, as a practicing lawyer, encountered the monolith during his frequent visits to the State Capitol to use the law library and sued various state officials because he believed it offended the Establishment Clause.¹⁰⁶

The District Court disagreed and upheld the monument as constitutional.¹⁰⁷ The Court of Appeals affirmed the lower court's

103. *Id.*

104. The text read as follows:

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor's house.

Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

Id. at 707 (Stevens, J., dissenting).

105. Other monuments included "Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, . . . Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers." *Id.* at 681 n.1 (majority opinion).

106. *Id.* at 682.

107. *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 U.S. Dist. LEXIS 26709, at *20 (W.D. Tex. Oct. 2, 2002). In light of the disarray of Establishment Clause jurisprudence, the district court analyzed the monument with both the *Lemon* test as well as O'Connor's reasonable observer standard. *Id.* at *12-*18.

findings regarding the purpose and effect of the monument.¹⁰⁸ The Supreme Court likewise affirmed.¹⁰⁹ In a plurality decision crafted by the late Chief Justice Rehnquist, the Court held that because the monument was a passive acknowledgement of our nation's religious roots, it did not run afoul of the Establishment Clause.¹¹⁰ The Court contrasted the monument with displays seen every day in school, arguing that unlike school displays that students are faced with every day, the Texas monolith was much more passive.¹¹¹ Thus, unlike school displays, which the Court had found unconstitutional,¹¹² the Texas monument did not violate the Establishment Clause.¹¹³

Unlike *Van Orden*, *McCreary* dealt not with a monument but rather an indoor courthouse display of nine documents,¹¹⁴ one of which was the Decalogue.¹¹⁵ The American Civil Liberties Union challenged

108. *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003).

109. *Van Orden*, 545 U.S. at 683.

110. *Id.* at 686. The relevance of passivity to Establishment Clause jurisprudence is not clear. In addition to the plurality supporting this new passivity exception, Justice Breyer advances his own approach. In his concurrence, Justice Breyer argues that the purpose behind the Establishment Clause should be examined to guarantee the greatest scope of protection of religious liberty for all. *Id.* at 698. (Breyer, J., concurring). He further argues that tests such as neutrality are insufficient. *Id.* at 699-700. See *infra* text accompanying notes 138-175.

111. *Id.* at 691.

112. See, e.g., *Stone v. Graham*, 449 U.S. 39, 43 (1980) (holding that a state statute requiring the display of the Ten Commandments in classrooms was unconstitutional).

113. *Van Orden*, 545 U.S. at 691-92.

114. As in *Van Orden*, *McCreary* did not deal with a law as is apparently required under the First Amendment. The Court makes no effort to explain why the Establishment Clause is triggered in this situation.

115. *McCreary v. ACLU*, 545 U.S. 844 (2005). Initially, the two counties involved—Pulaski and McCreary—posted the Ten Commandments alone in their respective courthouses. *Id.* at 850. When those displays were challenged, the counties “adopted a resolution calling for a more extensive exhibit meant to show that the Commandments [were] Kentucky’s ‘precedent legal code.’” *Id.* This was implemented by supplementing the display with eight other religiously-themed documents in smaller frames. *Id.* at 853. When McCreary County lost a suit challenging the displays, the county changed the displays in light of the District court’s holding that the second display did not have a clearly secular purpose because the documents that surrounded the Ten Commandments were only those foundational documents that referred specifically to Christianity. *ACLU v. McCreary*, 96 F. Supp. 2d 679, 687 (E.D. Ky. 2000). The counties replaced the

the display as unconstitutional, and the District Court agreed.¹¹⁶ Specifically, the court found that the display had a primarily religious purpose, and that, as such, it was unconstitutional.¹¹⁷ On appeal, the Sixth Circuit affirmed, finding that the display's purpose was not educational, but religious in nature.¹¹⁸ A majority of the Supreme Court, looking to the purpose of the display, agreed with the Court of Appeals, finding that because the display's purpose was not predominantly secular,¹¹⁹ it violated the Establishment Clause.¹²⁰

Although not explicit in doing so, several members of the Court dissenting in *Van Orden* and penning *McCreary* reasserted the validity of *Lemon*'s first two prongs. Specifically, Justices Stevens, with whom Justice Ginsburg dissents in *Van Orden*, and Justice Souter, in his majority opinion in *McCreary* and separate dissent in *Van Orden*, reaffirm the use of neutrality in Establishment Clause jurisprudence. Justice Stevens directly advocates the use of the neutrality principle, arguing that the test is acknowledged in a substantial number of the Court's decisions¹²¹ and that the monument does not satisfy the test,

display with nine framed documents of equal size and various historical import, including the Magna Carta, the lyrics to the Star Spangled Banner, and the Declaration of Independence. *McCreary*, 545 U.S. at 855-56.

116. *ACLU v. McCreary*, 145 F. Supp. 2d 845, 853 (E.D. Ky. 2001).

117. *Id.* at 848. Despite the counties' attempts to comply with the requirements of *Lemon* by establishing a secular purpose for their display, the court used the display changes against the counties to find the purpose for the display to be religious. *Id.* at 849-50.

118. *ACLU v. McCreary*, 354 F.3d 438, 455 (6th Cir. 2003). Of significance to the Sixth Circuit was the history of the case and the fact that the counties had erected three different displays. *Id.* at 457. However, the dissent asserted that prior displays should have no bearing on whether the current display was constitutional. *Id.* at 478 (Ryan, J., dissenting).

119. *McCreary*, 545 U.S. at 864. Not only must a display have a secular purpose, that secular purpose must not be secondary to a religious one. *Id.*

120. *Id.* at 881. In her concurrence, Justice O'Connor expresses a concern that the government is associating "one set of religious beliefs with the state" because she believes doing so "identifies nonadherents as outsiders [and] encroaches upon the individual's decision about whether and how to worship." *Id.* at 883 (O'Connor, J., concurring). Ironically, by requiring a primarily secular purpose for a religious display, the religious individuals become the very outsiders she is trying to protect. See *infra* notes 175-220 and accompanying text.

121. *Van Orden v. Perry*, 545 U.S. 677, 709, 733 (Stevens, J., dissenting).

instead demonstrating a preference for religion over irreligion.¹²² Justice Souter also reasserted the validity of neutrality analysis in his opinion in *McCreary*, although he did not apply any neutrality analysis directly.¹²³

Likewise, Justice Souter, with whom Justice Stevens and Justice Ginsburg dissented in *Van Orden* and who drafted the majority opinion in *McCreary*, not only insisted on a secular purpose to drive the government's interest in establishing a monument or display,¹²⁴ but required that the predominant purpose for Establishment Clause challenges be secular to survive constitutional scrutiny.¹²⁵ In his opinion, Justice Souter disregarded the county's attempts to satisfy the secular purpose prong, finding its attempts to broaden the display to have a general, educational purpose insufficient and inadequate to support a secular purpose.¹²⁶ Likewise in his dissent in *Van Orden*, Justice Souter discredited the seventeen other monuments surrounding the monolith in question, arguing that the apparent secular circumstance does not save the display.¹²⁷

Unfortunately, both of these standards—the secular purpose and the neutrality principles—are internally inconsistent and offer little in the way of a clear standard by which the government, be it federal or state, can operate. As both Justice Scalia and Justice Thomas rightly note in their respective concurrences in *Van Orden*, the Court needs to establish a consistent guidepost for what constitutes a violation of the Establishment Clause.¹²⁸ Yet as the Court has demonstrated in the *Van*

122. *Id.* at 733-34.

123. *McCreary*, 545 U.S. at 874-78. The discussion of neutrality may have been included to accommodate Justice Stevens, who is a member of the majority.

124. *Van Orden*, 545 U.S. at 737 (Souter, J., dissenting); *McCreary*, 545 U.S. at 864.

125. *McCreary*, 545 U.S. at 865.

126. *Id.* at 869-74.

127. *Van Orden*, 545 U.S. at 742 (Souter, J., dissenting).

128. *Id.* at 692-93 (Scalia & Thomas, JJ., concurring). See, e.g., *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in part and dissenting in part); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346-49 (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting). But see, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring) ("I am not ready to abandon all aspects of the

Orden and *McCreary* decisions, the *Lemon* test will continue to be employed.¹²⁹ However, as this Article will now show, the *Lemon* test should be discarded.

II. INTERNAL INCONSISTENCIES IN CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE

*[T]he Lemon test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests.*¹³⁰

While the majority of the Supreme Court seems hesitant to overrule the *Lemon* test, close inspection of its principles and the consequences flowing out of it demand precisely that. To that end, this Part will demonstrate the need to reject *Lemon*'s secular purpose and neutrality tests. Section A will address the logical, historical, and legal problems that the tests' requirements create.¹³¹ Section B will evaluate the adverse consequences of using *Lemon* as the Establishment Clause standard of review.¹³²

Lemon test. I do believe, however, that the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment.”).

129. Alan R. Gries, Note, *New York State School Board Association v. Sobol: A Commendable Attempt to Apply Confusing Establishment Clause Standards*, 38 VILL. L. REV. 759, 790 n.176 (1993). The *Lemon* test is typically used by those who adhere to a strict separationist approach. Jeremy T. Bunnow, Note, *Reinventing the Lemon: Agostini v. Felton and the Changing Nature of Establishment Clause Jurisprudence*, 1998 WIS. L. REV. 1133, 1169 (1998). See, e.g., Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994) (holding that a special school district designed around a religious village violated the Establishment Clause). For recent uses of the *Lemon* test, see *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1251 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315-17 (2000); *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997).

130. *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting). For a discussion on the wall of separation doctrine, see *supra* note 62.

131. See *infra* notes 134-220 and accompanying text.

132. See *infra* notes 221-31 and accompanying text.

A. *Problems with the Lemon Test*

*Whenever words are understood in a sense different from that which they had when introduced . . . mistakes may be very injurious.*¹³³

The *Lemon* test lays out three prongs, two of which the Court continues to use to determine whether the law at bar violates the Establishment Clause. Each of these two prongs has fatal flaws that undermine both the purpose of the test and the intent of the Establishment Clause, making the test internally inconsistent and erroneous. This Section will address each prong in turn.¹³⁴

1. The Fiction of Neutrality

Underlying the Court's analysis in *McCreary* and the dissent's in *Van Orden* is an express adherence to the neutrality principle advanced in *Lemon*. The second prong of the *Lemon* test, the neutrality principle, requires that the law in question be neutral towards religion, neither advocating nor prohibiting religion.¹³⁵ In *McCreary*, the majority of the Court, while using the neutrality test, concedes that "neutrality alone cannot possibly lay every issue to rest"¹³⁶ However, the Court advances the test as reasonable, arguing that neutrality is what the framers of the provision had in mind when the Bill of Rights was passed.¹³⁷ Likewise, Justice Stevens, joined in his dissent in *Van Orden* by Justice Ginsburg, argues that "[t]he basis for [neutrality] is firmly rooted in our Nation's history and our Constitution's text," although "the

133. BARTON, *supra* note 26, at 22 (quoting NOAH WEBSTER, THE HOLY BIBLE . . . WITH AMENDMENTS OF THE LANGUAGE iii (Durrie & Peck 1833)).

134. See *infra* text accompanying notes 135-72 for a discussion of the neutrality requirement. See *infra* text accompanying notes 173-220 for analysis of the secular purpose requirement.

135. *Lemon v. Kurtzman*, 403 U.S. 602, 612-16 (1971).

136. *McCreary v. ACLU*, 545 U.S. 844, 876 (2005).

137. *Id.*

requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers¹³⁸ Such a principle, however, even if it were part of the framers' intent,¹³⁹ is quite impossible to satisfy, both pragmatically and conceptually.

First, as a theoretical matter, the notion of neutrality is a fiction.¹⁴⁰ Every law the government passes advances one interest to the exclusion of another interest. For example, a speed limit on a state highway advances safety over and above individual freedom to travel at any speed the driver's conscience dictates. Likewise, a law prohibiting robbery subverts the strength of the more powerful to protect weaker individuals and their property rights. The middle ground that the Court seeks simply is not there.¹⁴¹

The Court concedes as much in its free speech and equal protection jurisprudence. When reviewing free speech claims, the Court employs a strict scrutiny standard. This standard requires the government to show that, although it is restricting speech, the government has a compelling interest for doing so and has narrowly tailored the law to serve that interest and nothing more.¹⁴² Likewise, in equal protection cases, the Court, depending upon the classification of

138. *Van Orden v. Perry*, 545 U.S. 677, 733-34 (2005) (Stevens, J., dissenting). Justice Stevens continues on to say that "[f]ortunately, we are not bound by the Framers' expectations—we are bound by the legal principles they enshrined in our Constitution." *Id.* at 734. Relying on Justice Story, Justice Stevens asserts that underlying Justice "Story's vision that States should not discriminate between Christian sects has as its foundation the principle that government must remain neutral between valid systems of belief." *Id.* But see JUSTICE JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 988 (Carolina Univ. Press 1987) (1851) ("An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.").

139. See *supra* text accompanying notes 40-46.

140. The closest any society can come to being completely neutral is to be "pluralistic in character, allowing many different and contending voices to be represented in public discourse." McConnell, *supra* note 18, at 21.

141. See ALBERT M. WOLTERS, CREATION REGAINED: BIBLICAL BASICS FOR A REFORMATIONAL WORLDVIEW 67 (2005).

142. See, e.g., *Republican Party v. White*, 536 U.S. 765, 775 (2002) (describing and applying strict scrutiny); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982) (requiring a compelling state interest that is tailored to avoid overinclusiveness).

the individual whose rights have been violated, uses one of three tests: the strict scrutiny standard,¹⁴³ the intermediate scrutiny standard,¹⁴⁴ or the rational basis test.¹⁴⁵ When imposing any of these standards of review, whether strict scrutiny, intermediate scrutiny, or rational basis, the Court recognizes that the government had an interest in mind when it passed the law in question.

That interest is never neutral. Governments pass laws to protect children,¹⁴⁶ to prevent campaign corruption,¹⁴⁷ to promote justice.¹⁴⁸ All such interests are advanced to the exclusion of another. In protecting children, the government does not allow adults free access to any and all pornography.¹⁴⁹ In seeking to prevent corruption, the government does not allow unregulated campaign contributions.¹⁵⁰ The government is not and cannot be neutral—it always has a position. When the Court does demand neutrality in the free speech context, it only demands viewpoint neutrality, rather than complete neutrality.¹⁵¹ And yet the Court, even in

143. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (noting that “[s]uch classifications are subject to the most exacting scrutiny”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that when laws restrict the rights of a racial group, the “courts must subject them to the most rigid scrutiny”).

144. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 516 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

145. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 631 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

146. *See* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (“Congress may pass valid laws to protect children from abuse, and it has . . .”).

147. *See* *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (“The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process . . .”).

148. *See* *Hibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 186 (2004) (“[T]he ability to briefly stop [a suspect], ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice”) (quoting *United States v. Hensley*, 469 U.S. 221, 229 (1985)).

149. *See, e.g.,* *Ashcroft*, 535 U.S. at 240.

150. *See, e.g.,* *Buckley*, 424 U.S. at 58.

151. *See, e.g.,* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker is a rationale for the restriction”). Ironically, the secular purpose test, discussed below in Part II.A.2, would likely fail even this narrow requirement because, as is demonstrated below,

recognizing the government's inherently biased position in other aspects of its constitutional jurisprudence, insists that it be neutral when religious issues are before it. Inevitably, the government will fail unless it can demonstrate that the interest at stake is secular, not religious, to the satisfaction of the Court—a position the Court believes preserves neutrality, when in fact it does not.¹⁵²

In addition to governments having partial interests in passing laws, laws themselves are inherently moral in nature.¹⁵³ They will inevitably promote some religious standard, be that Christian, Jewish, Islamic, or secular.¹⁵⁴ Even laws that do not overtly demonstrate such an underlying standard or worldview¹⁵⁵ still have morality at their root. For example, all states have a law prohibiting murder.¹⁵⁶ Such laws are motivated by a host of reasons, not the least of which is the notion of preserving life.¹⁵⁷ But why value life? The notion of human worth can be found in various religious sources,¹⁵⁸ ranging from notions of dignity given to humanity by God¹⁵⁹ to the right of every person to become

the test discriminates among religions by using secularism as a guidepost for passing constitutional muster. *See infra* text accompanying notes 173-220.

152. *See infra* text accompanying notes 173-220.

153. By deciding something is right or wrong, legislatures inherently imbue into law a moral aspect. ROUSAS JOHN RUSHDOONY, *LAW AND LIBERTY* 2 (1971).

154. *See id.* at 1 ("Every law on the statute books of every civil government is either an example of enacted morality or it is procedural thereto.")

155. *See infra* note 200.

156. *See* U.S. v. Feola, 420 U.S. 671, 683 (1975). Such a law is characterized as "malum in se," that is, "wrong in itself." *New Jersey v. T.L.O.*, 469 U.S. 325, 379 n.21 (1985).

157. For some, these laws are created to enforce religious commandments not to kill. *See* RUSHDOONY, *supra* note 153, at 1.

158. Religion includes secular humanist, as well as other more traditional religious traditions. *See supra* text accompanying notes 194-211.

159. *See* J. BUDZISZEWSKI, *WHAT WE CAN'T NOT KNOW* 35 (2003); RUSHDOONY, *supra* note 153, at 1 ("Laws against manslaughter and murder are moral laws; they echo the commandment, 'Thou shalt not kill'"). Budziszewski argues that such notions of morality are ultimately rooted in natural law, a philosophy which states, among other things, that within each human being is actual knowledge of absolute right and wrong, regardless of whether such knowledge and the source of such knowledge are acknowledged or ignored. *See generally* RUSHDOONY, *supra* note 153.

completely realized.¹⁶⁰ All such notions are moral principles upon which such laws are created.¹⁶¹ Even such discretionary laws¹⁶² as speed limit requirements are motivated by moral concerns of preserving life and protecting citizens.¹⁶³ As such, the underpinnings of the law as moral are clear.¹⁶⁴

Because of the law's inherent morality, it cannot be neutral regarding religion. The law will always serve to advance one or more religions, in some cases to the exclusion of another.¹⁶⁵ Thus, to assume that a law can ever be neutral, as this prong insists, is erroneous, and makes satisfying this prong impossible.

Second, as a practical matter, neutrality as required by this prong is unattainable. Consider the following laws: "prayers may not be offered in public schools;" "prayers may be offered in public schools." If a law must be neither for nor against religion, which of these laws could stand? For presumably, on the one hand, a law that permits prayer in schools is most assuredly advancing religion, and thus in violation of this prong.¹⁶⁶ On the other hand, a law that prohibits prayer is quite obviously prohibiting religion and should similarly be in violation of this prong.¹⁶⁷ What, then, is the school, in this context, or state or federal

160. See Humanist Manifesto I, <http://www.americanhumanist.org/about/manifesto1.html> (last visited Mar. 25, 2009).

161. The fundamental dispute is the source of that morality.

162. These laws are categorized as "malum prohibitum"—not naturally or inherently wrong in and of themselves, but still illegal. *New Jersey v. T.L.O.*, 469 U.S. 325, 379 n.21 (1985).

163. See RUSHDOONY, *supra* note 153, at 1 ("Traffic laws are moral laws also: their purpose is to protect life and property.").

164. Such notions were understood to the framers: "The transcendent values of Biblical natural law were the foundation of the American republic." BARTON, *supra* note 26, at 336.

165. This assumes that another religion exists that has tenets that are contrary to another religion's regarding the specific law in question. If not, the law will advance religion without having a prohibitive effect.

166. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (explaining that government aid must be "made available to both religious and secular beneficiaries on a nondiscriminatory basis").

167. See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992) (stating that a bar on government involvement with traditional religions affirmatively establishes a secular establishment). See *infra* text

government, in other similar situations, to do to prevent a Constitutional violation? The result is to place government in the position of, by necessity, violating the law.

Such a Catch 22 effect has further problems under the neutrality test because, while a law might be facially neutral, its effect might not be neutral. If, for example, the federal government decides that, because it cannot afford to provide money for all schools in a non-discriminatory manner, it will provide money for no schools, the government is, in effect, prohibiting religion. By not funding schools, well-established and well-funded religious groups would take up the task and would advance themselves, while fledgling religions with fewer resources would lose their voice in the public square.¹⁶⁸ Thus, by an act of omission, the government can still violate the purpose of this prong. Such an outcome is pragmatically unsound and places the government in a position where it cannot constitutionally achieve any of its objectives while satisfying this requirement.

To avoid the situation described above, the Court has modified the definition of neutrality on a case-by-case basis, letting some instances of religious discrimination slide.¹⁶⁹ Such an ad hoc approach to a self-created test is not only inappropriate, it makes the standard meaningless and difficult to satisfy. Consequently, the second prong of this test is as pragmatically problematic as it is both unattainable and unpredictable.

Finally, even if such a standard of neutrality were attainable, it is excessively broad. Historically, the framers did not intend to subject the government's involvement with religion to such close scrutiny. The ultimate concern of the framers was with the establishment of an imposed religion.¹⁷⁰ The framers wanted to preserve the citizen's natural right to, and ensure equality of, religious liberty.¹⁷¹ Such preservation

accompanying notes 194-211 for a discussion of why secular humanism constitutes a religion.

168. The demise of a religion is outside the scope of the Establishment Clause, but because of the neutrality requirement, the Supreme Court appears to have assumed the paternal role of overseeing the proliferation of all religions or none.

169. *See, e.g.,* *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting) (arguing that the Court's alleged neutrality analysis modifies the analysis to considering the degree of the offense against religion).

170. *See supra* text accompanying notes 41-43.

171. *See supra* text accompanying notes 41-43.

was not intended to prevent support for religion, or to create prohibitions on religion, but rather was designed to ensure that the experience in England of an established church was not duplicated in the United States.¹⁷² The second prong of the *Lemon* test exceeds this intent by requiring that the government neither advance nor inhibit religion.

Thus, for conceptual, practical, and historical reasons, neutrality as a standard for Establishment Clause jurisprudence is not only meaningless and unattainable, but unnecessarily broad in scope. As such, it should not be used in Establishment Clause analysis.

2. Secular Purpose: Advancing Religion for the Sake of Neutrality

In an attempt to advance its neutrality requirement, the Court delineates another test, one that is typically considered first: whether the law at issue serves a secular purpose.¹⁷³ As reiterated by Justice Souter, “‘*Lemon*’s ‘purpose’ requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.”¹⁷⁴ Arguably, the test is designed to prevent sending “the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members”¹⁷⁵

While historically this test has required government to demonstrate a secular purpose,¹⁷⁶ *McCreary* propounds a more stringent test: the primary purpose must be secular.¹⁷⁷ Although the *McCreary* plurality asserts that the secular purpose test “alone may rarely be

172. See *supra* text accompanying note 41.

173. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

174. *McCreary v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

175. *Id.* at 860 (internal quotations omitted) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000)).

176. See, e.g., *Lemon*, 403 U.S. at 612.

177. *McCreary*, 545 U.S. at 864-65. But see *City of Elkhart v. Books*, 532 U.S. 1058, 1062 (2001) (“In determining whether a secular purpose exists, we have simply required that the displays not be ‘motivated wholly by religious considerations.’”) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).

determinative,”¹⁷⁸ it proceeds to rely almost exclusively upon this test to determine the display at bar is unconstitutional.¹⁷⁹ However, by insisting that religious practices and laws serve a secular purpose, the Court effectively—and ironically, in light of their neutrality aspirations—establishes secular humanism as a religion.

“Secular,” as defined by Webster’s Dictionary, means “of or pertaining to worldly things or to things not regarded as sacred; temporal”; “not relating to or concerned with religion”¹⁸⁰ According to Webster’s Dictionary, “religion” is defined as:

a set of beliefs concerning the cause, nature and purpose of the universe, especially when considered as the creation of a superhuman agency or agencies, usually involving devotional and ritual observances, and often containing a moral code for the conduct of human affairs; . . . something a person believes in and follows devotedly.¹⁸¹

The court, in employing the term “secular,” cannot mean secular in its definitional sense. If it did—that is, if it required laws to have purposes that do not relate to religion—it would never find a law constitutional because all laws are based upon a moral code, the underpinnings of which are religious, whether Christian, Muslim, or

178. *McCreary*, 545 U.S. at 859-60 (citing *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring)).

179. *Id.* at 859-74.

180. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 1212 (1995) [Hereinafter Dictionary]. The problem with this definition is the assumption that religion is but one aspect of a person’s life. It divides human experience into “religious” and “secular,” with religious relating to church and worship, and secular involving everything else, such as family, politics, business, art, and education. WOLTERS, *supra* note 141, at 67-68. Such a distinction is false, however; for religious persons, including secularists, religion informs all other areas of life, including family, politics, business, art, and education. *Id.* at 68. All of these areas, including church and worship, can be secular to the extent that they are done in an irreligious manner. *Id.* This is ultimately a recharacterization of the two-kingdoms theory. See *supra* note 42.

181. DICTIONARY, *supra* note 180, at 1138.

secular, to name but a few.¹⁸² However, the Court has and does find the secular purpose prong to be satisfied.¹⁸³

It appears that, instead, the Court uses "secular purpose" to mean any reason that does not refer to or rely on traditionally recognized theistic religions. For example, the Court has recognized the secular purpose of supporting education,¹⁸⁴ but does not recognize supporting theistic religion in public schools.¹⁸⁵ The Court will permit teaching a moral code in schools,¹⁸⁶ but it will not permit moral codes espousing a creator.¹⁸⁷ The Court allows education to include evolution,¹⁸⁸ but does not support teaching creationism.¹⁸⁹ The fact that these distinctions coincide with secular humanist beliefs cannot be mere coincidence.¹⁹⁰ The Court, in employing this standard, is advocating and supporting secular humanism. And in so doing, the Court establishes a religion.

Secular humanists "deny that morality needs to be deduced from religious belief [in God] or that those who do not espouse a religious doctrine are immoral."¹⁹¹ In other words, they create a morality and a set of beliefs that are not God-based, but human-based.¹⁹²

182. See *supra* text accompanying notes 154-167.

183. See, e.g., *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (holding that a moment of quiet reflection in the wake of high-profile violence is a sufficient secular purpose); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (recognizing the Ten Commandments, in part, as advancing a secular purpose of establishing moral standards such as not lying, stealing, or honoring one's parents); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (holding that funding parochial schools satisfies the government's secular purpose of education).

184. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

185. See *Lee v. Weisman*, 505 U.S. 577, 630 (1992).

186. See *Stone*, 449 U.S. at 43.

187. *Van Orden v. Perry*, 545 U.S. 677, 714-15 (2005).

188. See *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

189. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

190. See *infra* notes 194-195.

191. PAUL KURTZ, IN DEFENSE OF SECULAR HUMANISM 17 (1983). The central tenet of secularism is the value of human happiness. *Id.*

192. *Id.* Such morality, secularists allege, is not necessarily antisocial, subjective, or promiscuous, "nor need it lead to the breakdown of moral standards." *Id.* Rather, secularists change the source of authority for morality from God to humanity. This change begs the question: which human has the authority to lay out morals that another must obey? The necessary outcome, contrary to the assertions quoted above, is that morality is indeed subjective, each person for his or herself, thereby undermining any universal standard that may exist or be recognized, and

Because of this, secular humanism is by definition a religion.¹⁹³ First, it adheres to a set of beliefs, namely, those things that conform to secular morality.¹⁹⁴ Despite seeking to appear non-religious in nature, historically, secular humanists have espoused a list of the basic tenets of their beliefs in their 1933 Humanist Manifesto.¹⁹⁵ These tenets have

providing an inadequate and unpredictable basis upon which to establish a standard of constitutional review.

193. See *Secular Absolutism*, WALL ST. J. (Mar. 14, 2004), <http://www.opinionjournal.com/editorial/feature.html?id=110004819> (last visited Mar. 25, 2009) (discussing secular ideology as a potent religious force).

194. See Humanist Manifesto I, <http://www.americanhumanist.org/about/manifesto1.html> (last visited Mar. 25, 2009).

195. *Id.* They are as follows:

FIRST: Religious humanists regard the universe as self-existing and not created.

SECOND: Humanism believes that man is a part of nature and that he has emerged as a result of a continuous process.

THIRD: Holding an organic view of life, humanists find that the traditional dualism of mind and body must be rejected.

FOURTH: Humanism recognizes that man's religious culture and civilization, as clearly depicted by anthropology and history, are the product of a gradual development due to his interaction with his natural environment and with his social heritage. The individual born into a particular culture is largely molded by that culture.

FIFTH: Humanism asserts that the nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values. Obviously humanism does not deny the possibility of realities as yet undiscovered, but it does insist that the way to determine the existence and value of any and all realities is by means of intelligent inquiry and by the assessment of their relations to human needs. Religion must formulate its hopes and plans in the light of the scientific spirit and method.

SIXTH: We are convinced that the time has passed for theism, deism, modernism, and the several varieties of "new thought."

SEVENTH: Religion consists of those actions, purposes, and experiences which are humanly significant. Nothing human is alien to the religious. It includes labor, art, science, philosophy, love, friendship, recreation—all that is in its degree expressive of intelligently satisfying human living.

The distinction between the sacred and the secular can no longer be maintained.

EIGHTH: Religious humanism considers the complete realization of human personality to be the end of man's life and seeks its development and fulfillment in the here and now. This is the explanation of the humanist's social passion.

NINTH: In the place of the old attitudes involved in worship and prayer the humanist finds his religious emotions expressed in a heightened sense of personal life and in a cooperative effort to promote social well-being.

TENTH: It follows that there will be no uniquely religious emotions and attitudes of the kind hitherto associated with belief in the supernatural.

ELEVENTH: Man will learn to face the crises of life in terms of his knowledge of their naturalness and probability. Reasonable and manly attitudes will be fostered by education and supported by custom. We assume that humanism will take the path of social and mental hygiene and discourage sentimental and unreal hopes and wishful thinking.

TWELFTH: Believing that religion must work increasingly for joy in living, religious humanists aim to foster the creative in man and to encourage achievements that add to the satisfactions of life.

THIRTEENTH: Religious humanism maintains that all associations and institutions exist for the fulfillment of human life. The intelligent evaluation, transformation, control, and direction of such associations and institutions with a view to the enhancement of human life is the purpose and program of humanism. Certainly religious institutions, their ritualistic forms, ecclesiastical methods, and communal activities must be reconstituted as rapidly as experience allows, in order to function effectively in the modern world.

FOURTEENTH: The humanists are firmly convinced that existing acquisitive and profit-motivated society has shown itself to be inadequate and that a radical change in methods, controls, and motives must be instituted. A socialized and cooperative economic order must be established to the end that the equitable distribution of the means of life be possible. The goal of humanism is a free and universal society in which people voluntarily and intelligently cooperate for the common good. Humanists demand a shared life in a shared world.

FIFTEENTH AND LAST: We assert that humanism will: (a) affirm life rather than deny it; (b) seek to elicit the possibilities of life, not flee from them; and (c) endeavor to

been supplemented and explained further in the second¹⁹⁶ and third Humanist Manifestos,¹⁹⁷ and in other writings.¹⁹⁸

Second, even though its morality is derived from a non-traditional source—reason rather than God—secularism does contain a moral code.¹⁹⁹ As mentioned above, humanists espouse the basic tenets of their beliefs—the Humanist Manifesto—in all its revisions.

Finally, it is a worldview that is believed in and adhered to just as devotedly as any traditional religion.²⁰⁰ As such, secular humanism is just as much a religion as are Christianity, Islam, and Buddhism.

Secular humanists have supported this assertion. The first Humanist Manifesto referred to humanism as a religion.²⁰¹ Likewise, noted secular humanists such as John Dewey signed the first Humanist Manifesto, which states that “[i]n order that religious humanism may be better understood we, the undersigned, desire to make certain affirmations which we believe the facts of our contemporary life demonstrate.”²⁰² Charles F. Potter, another signer of the first Humanist Manifesto and a humanist in the early 1920s, drafted a book entitled *Humanism: A New Religion*. Even more contemporary humanists like Paul Kurtz have conceded as much, asserting that a large number of

establish the conditions of a satisfactory life for all, not merely for the few. By this positive morale and intention humanism will be guided, and from this perspective and alignment the techniques and efforts of humanism will flow.

Id.

196. Humanist Manifesto II, <http://www.americanhumanist.org/about/manifesto2.html> (last visited Mar. 25, 2009).

197. Humanist Manifesto III, http://www.americanhumanist.org/who_we_are/about_humanism/Humanist_Manifesto_III (last visited Mar. 25, 2009).

198. *E.g.*, KURTZ, *supra* note 191.

199. See Council for Secular Humanism, *What is Secular Humanism?*, <http://www.secularhumanism.org/index.php?section=main&page=what> (last visited Mar. 25, 2009).

200. *Id.* Worldview is defined as “the comprehensive framework of one’s basic beliefs about things.” WOLTERS, *supra* note 141, at 2. It is prescientific in that it is an “inescapable component of all human knowing.” *Id.* at 9; see generally KURTZ, *supra* note 191 (laying out the ten tenets of secular humanism).

201. See Humanist Manifesto I, *supra* note 194.

202. *Id.*

humanists "consider themselves to be religious"²⁰³ Secular humanists recognize their role as one of replacing traditional religions, which espouse a God, with a man-centered understanding of the world around them.²⁰⁴

Even if secular humanism were not by definition a religion, the Supreme Court has found it to be so for the purposes of First Amendment analysis. In *Torcaso v. Watkins*²⁰⁵ the Supreme Court stated that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."²⁰⁶ In *Welsh v. United States*²⁰⁷ and *Edwards v. Aguillard*²⁰⁸ the Court subsequently confirmed that it had previously recognized secular humanism as a religion.²⁰⁹

Further, the Supreme Court has determined that what constitutes religion under the Free Exercise Clause is "a sincerely held religious belief."²¹⁰ Belonging to a religious sect is not required.²¹¹ This even broader definition of religion encompasses secular humanism within its purview, as secular humanism is a belief that is just as sincerely followed as are traditional religious tenets.²¹² The argument that secular humanism is not governed by an organized sect is irrelevant to the Court's analysis.²¹³

203. KURTZ, *supra* note 191, at 116 (explaining, however, that humanists "mean something different by 'religion' from what the theist means").

204. See Council for Secular Humanism, *What is Secular Humanism?*, *supra* note 199.

205. 367 U.S. 488 (1961).

206. *Id.* at 495 n.11 (citations omitted).

207. 398 U.S. 333 (1970).

208. 482 U.S. 578 (1987).

209. *Welsh*, 398 U.S. at 357 n.8 (Harlan, J., concurring); *Edwards*, 482 U.S. at 624 (Scalia, J., dissenting).

210. See, e.g., *Frazee v. Ill. Dep't of Employment*, 489 U.S. 829, 834 (1989) (holding that disqualifying an employee from receiving unemployment benefits because the employee refused to work in relation to his religious beliefs violated the Free Exercise Clause).

211. *Id.*

212. See generally KURTZ, *supra* note 191 (laying out the ten tenets of secular humanism).

213. See *Frazee*, 489 U.S. at 832-33 ("none of those decisions turned on that consideration or on any tenet of the sect involved that forbade the work the claimant

Because secular humanism satisfies Free Exercise requirements for religious status, it would be disingenuous to assert that it does not hold such a status for Establishment Clause purposes. For the purposes of legal analysis under either religion clause, secular humanism is a religion. And under Establishment Clause jurisprudence, secular purposes are as much religious purposes as are those traditionally believed to be religious.²¹⁴

Because secular humanism constitutes a religion under both judicial and lay understandings of the term, the first prong's insistence upon finding a "secular purpose" to justify a law is contrary to the purpose of the test, which allegedly is neutrality.²¹⁵ By its own terms, this prong advocates and endorses secular humanism, which is a religion. Thus, rather than eradicating any religious bias in government by ensuring that it "neither advances nor inhibits religion,"²¹⁶ the secular purpose requirement demands that the government have a religiously secular justification for its laws. Rather than achieving any sort of neutrality on the part of the government regarding religion, this prong mandates religious advocacy, and only that of a particular variety.

Further, this test, in advocating a secular religious state, is doing precisely what the Establishment Clause was designed to avoid.²¹⁷ By mandating that a particular religious standard be maintained, the Supreme Court has effectively created a national religion to which the government, both federal and state, is subject.²¹⁸ This resulting national standard is exactly what the framers were attempting to prevent by

refused to perform. Our judgments in those cases rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question.").

214. This also demonstrates the Court's inconsistencies in analyzing the Religion Clauses, as each clause is subject to a different definition of "religion." See generally Vincent Phillip Munoz, *Establishing Free Exercise*, 138 FIRST THINGS, Dec. 2003, at 14.

215. See *Sch. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) ("The State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'").

216. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

217. See *supra* text accompanying notes 41-43.

218. See *supra* note 43 for discussion of the incorporation doctrine.

creating the Establishment Clause.²¹⁹ Thus, not only does this prong undermine the purpose of the Court in framing the test, it flagrantly violates the premise of the Establishment Clause.²²⁰ As such, it is an inappropriate standard for Establishment Clause analysis.

B. Consequences of Using the Lemon Test

*The real object of the [First A]mendment was not . . . to advance [] Mahometanism, or Judaism, or infidelity, by prostrating Christianity*²²¹

The results of using the neutrality and secular purpose tests for Establishment Clause analysis are troubling. First, these requirements have the effect of limiting religious freedom by denying religions governmental support that can help them to flourish, and by imposing compliance standards upon both religion and the government.²²² The framers would not have countenanced such an outcome, as it is contrary to the clause's intent.²²³

219. See *supra* text accompanying notes 41-43.

220. Even if secularism were not a religion, because all law is informed by religious beliefs and governed by some moral code, no law would be able to actually satisfy this prong. See *supra* text accompanying notes 156-68.

221. BARTON, *supra* note 26, at 31 (quoting JUSTICE JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Vol. III 728, § 1871). But see *Van Orden v. Perry*, 545 U.S. 677, 728-29 (2005) (Stevens, J., dissenting) (alleging that "[t]he original understanding of the type of religion that qualified for constitutional protection under the *Establishment Clause* likely did not include those followers of Judaism and Islam The inclusion of Jews and Muslims inside the category of constitutionally favored religions surely would have shocked . . . Justice Story.").

222. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 580 (1989) (requiring constitutional religious displays to surround themselves with other displays from a different religion).

223. See *supra* text accompanying note 18. Further, the *Lemon* test denies religion its role of reforming citizens. After all, it is not the role of the law, but rather the role of religion, in whatever form it takes, to reform human beings. RUSHDOONY, *supra* note 153, at 3. The checks and balances built into the United

Second, the neutrality test promotes ad hoc decision-making, which has never been appropriate in a legal system in which *stare decisis* and consistency are valued.²²⁴ The framers expected the legislative history of the Bill of Rights to be considered when interpreting them, analogizing the analysis to that of statutory interpretation.²²⁵ The use of the *Lemon* test is contrary to such expectations, and does not sufficiently provide the government with notice as to what is constitutional and unconstitutional behavior under the Establishment Clause.

Likewise, the secular purpose requirement is arbitrarily enforced. Under the secular purpose test, if two governments advanced a law, such as “Murder is a crime”—in effect, the Sixth Commandment—then, that law could be challenged under Establishment Clause grounds because the purpose for the law is relevant.²²⁶ Under this prong, whether or not that law would be deemed in violation of the Establishment Clause would depend more upon the motives of the government passing the law than upon the law itself. Thus, a government that decided to pass such a law because it wanted to ensure greater tax revenue by protecting its taxpayers would presumably be permitted to pass such a law. However, a

States Constitution demonstrate this notion, that humanity is inherently inclined towards abuse of power and evil. McConnell, *supra* note 18, at 7.

224. See *supra* text accompanying note 1.

225. BARTON, *supra* note 26, at 21. For example, Jefferson, as President, stated:

On every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.

Id. at 22. Similarly, Madison wrote:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense.

Id.

226. The fact that it has not been so challenged is likely because secular humanists like the law and can advance a palatable secular reason for preserving the law.

government that viewed its citizens as image-bearers of God and, as such, entitled to pursue “life, liberty, and the pursuit of happiness” for that reason, or viewed murder as a contravention of God’s moral law that should be punished, would apparently not be able to propound such a law constitutionally merely because their predominant reasons were not secular.²²⁷

Such an outcome is not what the drafters had in mind. The drafters wanted Americans to be free to believe and to be governed as their consciences dictated.²²⁸ But the secular purpose requirement has exactly the opposite effect—it penalizes governments that pass laws because they are motivated by religious beliefs and affirms those governments that are comprised of a secular majority. It sends the message that secular, non-religious reasons for passing a law are the only acceptable justifications for that law and thereby violates the right of conscience that the framers sought to protect.²²⁹

Finally, *Lemon*’s neutrality and secular purpose standards alter the Constitution in an impermissible manner through judicial activism. When framing the Constitution, “[t]he Founders made it clear that *if* the meaning and application of *any* part of the Constitution was to be altered, it had to be at the hands of the people—not at the feet of the Court.”²³⁰ However, the Court, by creating these standards, interprets the Establishment Clause to create a greater separation between church and state than was ever intended.²³¹ Such activism is an impermissible usurpation of democratic power.

For all these reasons, considerations of neutrality and secular purposes should be discarded as the standards for determining the

227. This is what the plurality in *McCreary* clearly countenances as a legitimate outcome. See *McCreary v. ACLU*, 545 U.S. 844, 860-61 (2005) (“Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed: when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable.”).

228. See *supra* text accompanying notes 42-43.

229. See *supra* text accompanying notes 42-43.

230. BARTON, *supra* note 26, at 33-34.

231. See *supra* note 62 and accompanying discussion.

constitutional validity of government actions and laws regarding religion under the Establishment Clause.

III. RETURNING ESTABLISHMENT CLAUSE JURISPRUDENCE TO ITS ROOTS

*[W]here there is no law, there is no liberty; and nothing deserves the name of law but that which is certain and universal in its operation upon all the members of the community.*²³²

Clearly, the Court's neutrality and secular purpose principles go beyond the intent of the Establishment Clause.²³³ As Justice Thomas points out, a more tenable, internally consistent standard that complies with the framers' intent for the Establishment Clause should be used instead.²³⁴

The Court should focus its analysis upon what the drafters meant by prohibiting the government from establishing a religion. Because "the forbidden 'establishment' does not refer to official cooperation with religion but rather to official preference for one or a few religious sects at the expense of all the others in the community,"²³⁵ the Court should narrow its focus to reflect this intention. The Establishment Clause should be applied in a manner that reflects the framers' interests in preserving religious expression from governmental intrusion by prohibiting official governmental preference of one religious belief to the exclusion of others through its legislation and laws.²³⁶ The Establishment Clause should be applied to only those circumstances where the government has created a law that officially establishes a religion, conveying benefits exclusive to those of that religious

232. BARTON, *supra* note 26, at 336 (quoting I *Letters*, Benjamin Rush to David Ramsay, March or April 1788, at 454). Specifically, "America's immutable principles of right and wrong were not based on the rapidly fluctuating feelings and emotions of the people but rather on what Montesquieu identified as the 'principles that do not change.'" *Id.*

233. See *supra* notes 133-231 and accompanying text (analyzing the problems the *Lemon* test presents).

234. The framers followed a two-kingdoms model in establishing the Constitution. See *supra* note 42.

235. ANASTAPLO, *supra* note 43, at 56.

236. See *supra* text accompanying notes 41-43.

persuasion and denying those benefits to others because of their different religious perspective.²³⁷ No one's civil rights should vary because of their religious beliefs.²³⁸

Having narrowed the Establishment Clause to its proper purview, the question remains as to what to do with causes of action that challenge provisions involving religious issues but do not rise to the level of establishing a religion.²³⁹ Such actions include prayer in school, teaching intelligent design in school, funding of and tax exemptions for religious institutions, and even the displays challenged in *McCreary* and *Van Orden*. What all of these issues have in common is that they all pertain to speech. The Ten Commandments are speech. A nativity scene is an expression of speech. Prayer in schools and teaching evolution or intelligent design to students both involve speech. Whether governmental speech occurs in the form of funding or tax exemptions or private speech in created fora, all pertain to speech. The proper analysis for such issues, rather than focusing on the Establishment Clause, should fall under the Free Speech Clause of the First Amendment.

As in any free speech challenge, the court considers who the speaker is.²⁴⁰ If it is the government, then the Court has held that regardless of the viewpoint or content of the speech, the speech is okay because the government is saying it.²⁴¹ Thus, in the context of both *McCreary* and *Van Orden*, the Ten Commandment displays might be constitutional because the government is speaking by supporting a document it believed had a place in that state's history. Likewise, the curriculum of public schools is a reflection of the government's values and constitutes government speech.²⁴²

237. See *supra* text accompanying notes 41-43.

238. See *supra* text accompanying notes 41-43.

239. Some might argue that the Free Exercise Clause should govern such actions. However, the Free Exercise Clause does not serve as a limitation upon religious actions but instead, at least in theory, protects such actions. As such, it is not a suitable candidate for challenging the constitutionality of religious activities.

240. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

241. See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

242. *Rosenberger*, 515 U.S. at 833.

However, in those circumstances where the government is not speaking, the Supreme Court has stated that the government may not discriminate based upon viewpoint or the content of the speech offered.²⁴³ If the government creates a forum in which anyone has an opportunity to speak, such a forum cannot be regulated to prohibit certain points of view.²⁴⁴ Thus, if the Ten Commandments in *McCreary* were the result of the government opening the courthouse up to various displays, it could not discriminate against one display based upon its ideology.²⁴⁵

By shifting the focus of such challenges away from the Establishment Clause and to free speech analysis where it rightfully belongs, the Establishment Clause is appropriately narrowed and applied only in those situations where the law demonstrates exclusive religious adherence to the detriment of other religions.

CONCLUSION

*If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it.*²⁴⁶

As is demonstrated above, the *Lemon* test is both internally inconsistent and incompatible with the framers' intent. Its arbitrariness, overbreadth, and destructive effect on religion are contrary to the purpose of the Establishment Clause. The byproduct of using such an ill-formed test has been inconsistency and unpredictability. Because of this, the test should be abandoned, archived as a brief anomaly in legal history, and replaced with a narrower construction of the Establishment Clause that reflects the framers' intent.

243. *Id.* at 834.

244. *Id.*

245. *See id.* at 829. The opinion offers only a preliminary look at free speech forum analysis. For a more complete review, see Gregory S. Weber, *Needling the Thread: A Moderator's Guide to Freedom of Speech Limitations on Government Sponsored Web-Based Threaded Discussions*, 7 COMP. L. REV. & TECH. J. 323, 330-38 (2004).

246. *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (arguing that the *Lemon* test should be abandoned).